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Supreme Court, U.S.
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No. 02-1791

In The

Supreme Court of the United States

BIDDLE STREET BISTRO, INC.,

Petitioner,

v.

TLJ COMPANY, LLC and
BREMEN BANK AND TRUST COMPANY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does a United States court of appeals abuse its discretion when it dismisses an appeal when the appellant is a corporation that files, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief?

(2) Does a United States court of appeals abuse its discretion when it denies a corporation leave to file a corrected notice of appeal and all other pleadings through counsel after it has filed, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief?

CORPORATE DISCLOSURE STATEMENT

1. Petitioner, Biddle Street Bistro, Inc., was a Defendant below. Biddle Street Bistro, Inc. has no parent companies and/or subsidiaries not wholly owned by the corporation. No publicly held company owns 10 percent or more of the corporation's stock. The corporation was wholly owned by shareholders Jeffrey Eilers and Janet Y. Tennant.

2. Respondent, TLJ Company, LLC was a Defendant below. TLJ Company, LLC has no parent companies and/or subsidiaries not wholly owned by the corporation. No publicly held company owns 10 percent or more of TLJ Company, LLC.

3. Respondent, Bremen Bank and Trust Company was a Defendant below. The parent company of Bremen Bank and Trust Company is Bremen Bancorp, Inc. Bremen Bank and Trust Company has no subsidiaries not wholly owned by it and no publicly held company owns 10 percent or more of it.

4. No review is sought by Respondent as to Plaintiff below, Allstate Insurance Company.

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COUNTER-STATEMENT OF THE CASE

Biddle Street Bistro (hereafter BSB) asks this Court to review the decision of the Eighth Circuit court of appeals to dismiss its appeal. BSB appealed the district court's entry of judgment in favor of Respondents TLJ Company, LLC (hereafter TLJ) and Bremen Bank and Trust Company (hereafter Bremen), based on the unopposed motion for summary judgment filed by Respondents.

On August 21, 2002 BSB simultaneously filed its notice of appeal and Rule 60(b) motion through pro se shareholders. Thereafter, BSB filed: (1) an Entry of Appearance; (2) an Appellant's Form A; (3) a Corporate Disclosure Statement; (4) the Appellant's Designation of Record; (5) a Notice of Method of Preparing the Record on Appeal and Statement of Issues; (6) the Appellant's Brief; (7) the Appendix; and (8) a Reply Brief, all over a three month period. The pro se shareholders signed and submitted all of the foregoing documents on behalf of BSB.

Upon receipt of the pro se Reply Brief, the Clerk of the Eighth Circuit notified the shareholders that the appeal was subject to dismissal, explaining that a corporation may not appear pro se. That November 18, 2002 letter also states that, "As a result, your notice of appeal, as well as all of your subsequent pleadings, are subject to being stricken and your appeal is subject to being dismissed." (Pet.App. at A-11). This letter did not tell BSB that the defect in its filings was related to any signature requirement.

On December 17, 2002, BSB filed, through newly retained counsel, Appellant Biddle Street Bistro's Motion for Leave to File Pleadings and Briefs Previously Filed Pro Se (Pet.App. at A-12) and Appellant Biddle Street Bistro's

Motion to Submit Corrected Notice of Appeal and Adopt Pleadings Previously Filed Pro Se. (Pet.App. at A-15). BSB has never disputed that the notice of appeal filed on August 21, 2002 was incorrect. It has never disputed that a corporation may only appear before a federal court through licensed counsel.

On February 12, 2003 the Eight Circuit court of appeals entered its judgment denying BSB's Motion for Leave and dismissing BSB's appeal for lack of jurisdiction for failure to file a valid notice of appeal. (Pet. App. at A-95). This judgment did not state that the dismissal was due to the fact that the notice lacked an appropriate signature, by counsel or anyone else. The judgment did not state that the failure to file a valid notice of appeal could never be remedied.

BSB misstates the nature of the relief it seeks. BSB really asks this Court to overrule the Eighth Circuit's refusal to sanction the continued improper pro se representation of a corporation in federal court. BSB provides no decision of any Court to support this request. BSB provides no authority stating that the Eighth Circuit would have abused its discretion by striking its Brief or other pleadings for being filed pro se. Yet striking those pleadings would have resulted in the same result, a dismissal of its appeal.

REASONS FOR DENYING THE WRIT

1. A United States court of appeals does not abuse its discretion when it dismisses an appeal when the appellant is a corporation that files, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief, prosecuting an entire appeal without counsel.

BSB argues that the Eighth Circuit added a jurisdictional signature requirement when it dismissed its appeal. This argument lacks any support in the record. The notice of appeal as well as the numerous subsequent pro se filings were signed, but by pro se shareholders. BSB may be correct that Federal Rule of Appellate Procedure 3 contains no signature requirement. However, the Eighth Circuit never stated, or intimated, that the absence of a signature, any signature, was the basis for the dismissal. If the clerk's November 18, 2002 letter is evidence of the basis for the Eighth Circuit's finding that the notice of appeal is invalid, then the court found it was invalidly filed pro se on behalf of a corporation.

BSB avoids the real reason for the dismissal because all cases it cites in support of its Petition clearly state that a corporation may not proceed before a federal court but through counsel. BSB all but admitted the notice of appeal was improper when it requested leave to file a "corrected" notice of appeal.

BSB cites no authority contradicting the ability of the Eighth Circuit to dismiss its appeal for failure to file a valid notice when the corporation's notice was filed improperly pro se. It fails to cite authority requiring the Eighth Circuit court of appeals to allow a corporate appellant to

remedy this defect after it has submitted numerous pro se filings.

To confuse the real issue, BSB contorts the Eighth Circuit's Judgment to create a conflict with this Court's decision in *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001). In *Becker*, this Court ruled that the appeal of that individual pro se appellant should not be dismissed for failure to physically sign an otherwise valid notice of appeal. This Court held that under the very narrow circumstances of that case, he should have been allowed to file a signed notice. The entire controversy was over a missing signature and the application of Rule of Civil Procedure 11(a), an issue not present here.

Here, the Eighth Circuit did not rule that the failure to file a valid notice of appeal would always result in dismissal. It merely ruled that the appeal would be dismissed under the facts and circumstances of this case.

Here, it is uncontested that the notice and all pleadings were filed by an entity that had no legal capacity to proceed before the Eighth Circuit except though counsel. Becker's capacity to proceed pro se was not an issue.

Petitioner's suggestion that the Eighth Circuit's dismissal of its appeal conflicts with *Becker* is void of merit.

2. A United States court of appeals does not abuse its discretion when it denies a corporation leave to file a corrected notice of appeal and all other pleadings through counsel after it has filed, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief, prosecuting an entire appeal without counsel.

BSB incorrectly turns the Eighth Circuit's denial of its motion for leave into an issue covered by Federal Rule of Civil Procedure 11(a). The denial of the motion for leave has nothing to do with any signature requirement. This issue was discussed above.

BSB fails to cite one case holding that a United States court of appeals must allow a corporation proceeding pro se, in violation of law, to file a corrected notice of appeal and all previous pro se briefs. Rather, BSB cites decisions where United States courts of appeal have granted leave to obtain counsel and file appropriate pleadings at the inception of the appeal. As each of those decisions show, the facts are important and the court of appeals may exercise discretion. None of these decisions involve pro se shareholders representing a corporation for months, filing numerous pleadings, including briefs, without counsel. The extent of the pro se representation and activity in this case is far beyond that contemplated or referred to any of the cases cited by BSB.

While BSB cited no authority for its Motion for Leave, it appears that it sought relief under Rule 26(b) allowing the appellate court to extend the time prescribed by the rules or by its orders to perform any act or may permit an act to be done after that time expires for good cause.

Rule 2 of the Federal Rules of Appellate Procedure indicates that on its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of the Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b). This Federal Appellate Rule 2 has been interpreted to grant "broad equitable discretion" to the court of appeals. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); 108 S.Ct. 2405, 101 L.Ed. 2d 285.

The Eighth Circuit denied BSB's Motion for Leave pursuant to that broad equitable discretion. BSB has not argued that the denial was an abuse of this discretion, nor could it under the circumstances. BSB has further failed to show that the denial of the Motion as to the notice of appeal in particular was dispositive. For example, the Eighth Circuit could have allowed BSB leave to file a corrected notice of appeal but denied the motion as to the briefs filed pro se. This would have resulted in the briefs being stricken and the appeal being dismissed. This is not a case where one procedural misstep resulted in a dismissal. The entire appeal was prosecuted contrary to law.

The decisions cited by BSB illustrate the level of discretion afforded the Eighth Circuit in determining whether or not an appeal should be dismissed for failure to file a valid notice. In each case the appellate court exercised its discretion in making a determination that the appeal would not be dismissed. The appellant only avoided dismissal by having licensed counsel enter and take the case "promptly" after the notice of appeal was filed pro se.

BSB cites *Bigelow v. A & A Realty Limited*, 179 F.3d 1164 (9th Cir. 1999) in support of its argument that the Eighth Circuit erred in denying its Motion for Leave.

However, in *Bigelow*, an attorney entered his appearance after the notice was filed, filed the brief, responded to the motions and argued the case. Id. at 1165. The court stated it found nothing in the Federal Rules of Appellate Procedure that requires dismissal of the appeal if a corporate officer signs the notice of appeal and a lawyer thereafter promptly enters his appearance and undertakes the representation. Id. The appellate court exercised its discretion in not dismissing the appeal under the circumstances before it.

Similarly, in *Instituto De Educacion Universal Corp. v. United States Department of Education*, 209 F.3d 18 (1st Cir. 2000), the First Circuit addressed only whether a corporate officer may sign a notice of appeal on behalf of a corporation. Id. at 22. It held that filing the notice of appeal was not ongoing legal representation that required an attorney and that as long as the corporate appellant promptly retained counsel, a corporate officer could sign the notice of appeal. Id. Again, the appellate court exercised its discretion in not dismissing the appeal under the particular circumstances.

In *AAA Venetian Blind Sales, Inc. v. Beaufieu of America, Inc.*, 124 F.3d 196, 1997 WL 476517 (6th Cir. (Mich.)), the Sixth Circuit Court of Appeals exercised its discretion in declining to dismiss an appeal because a licensed attorney failed to sign the corporation's notice of appeal. Id. at *2. There, the court noted that a licensed attorney filed an entry of appearance and the appellant's brief. Id.

In *Anunciation v. West Capital Financial Services Corp.*, 97 F.3d 1458, 1996 WL 534049 (9th Cir. (Nev.)), the

Ninth Circuit exercised its discretion in allowing an appeal to proceed through an attorney not licensed to practice before the district court but that was a member of the bar of the Ninth Circuit signed the corporation's notice of appeal. Id. at **1. *Anunciation* is not at all similar to the instant action, the notice of appeal was filed by licensed counsel.

In *Lewis v. Lenc-Smith Manufacturing Company*, 784 F.2d 829 (7th Cir. 1986), the Seventh Circuit Court of Appeals exercised its discretion in allowing a pro se individual appellant to correctly file an unsigned notice of appeal and file a brief after striking the entry of appearance of her counsel, who was not an attorney. Id. at 831. *Lewis* bears no factual resemblance to the instant action. The issues in *Lewis* are different and it certainly does not require an appellate court to always excuse the failure to file a valid notice of appeal.

In *K.M.A., Inc. v. General Motors Acceptance Corporation*, 652 F.2d 398 (5th Cir. 1981), the Fifth Circuit court of appeals noted that it was unclear whether a non-attorney filing a corporation's notice of appeals is sufficient to deprive the appellate court of jurisdiction. Id at 399. There the court exercised its discretion in granting the appellee's motion to dismiss unless a licensed attorney filed an entry of appearance within 30 days. Id. This decision is yet another example of the discretion that may be exercised by the court of appeals to excuse defects under a specific set of circumstances.

The Eighth Circuit's dismissal of Petitioner's appeal for failure to file a valid notice of appeal is not inconsistent with any decision of this Court or any court of appeals. This is a unique factual scenario under which the Eighth

Circuit exercised its discretion in denying BSB's Motion for Leave and in dismissing the appeal. BSB cannot argue that the filings by its pro se shareholders were ministerial in nature or did not amount to the ongoing practice of law as is condemned in the cases it cites. BSB's entire appeal was prosecuted pro se.

The Eighth Circuit's refusal to grant BSB's Motion for Leave and decision to Dismiss the pro se corporate appeal is not anomalous. Other courts have dismissed or otherwise refused to acknowledge pro se corporate appeals, particularly when the corporation continues to proceed pro se after the notice is filed. In these cases, unlike those cited by BSB, there has been no prompt entry by counsel. This is a critical distinction. See *Muzikowski v. Paramount Pictures Corporation*, 322 F.3d 918 (7th Cir. 2003) (pro se not-for-profit corporate appellant dismissed as a party to the appeal); *Jacobs v. Patent Enforcement Fund, Inc.*, 230 F.3d 565, 568-69 (2nd Cir. 2000) (appeal of pro se corporation dismissed because notice was signed and filed by president of the corporation); *Tamijora, Inc. v. Lubman*, 20 Fed.App.133, 134, 2001 WL 1129122 (4th Cir. (Va.)) (corporate appellant's appeal dismissed for lack of jurisdiction when not represented by counsel and officer filed notice of appeal); *Individual Securities, Ltd. v. Ross*, 152 F.3d 918, 1998 WL 385835 (2nd Cir. (N.Y.)) (corporate appeal dismissed because prosecuted pro se); *E.C. Bowlds v. Hicks*, 33 F.3d 51, 1994 WL 449061 (4th Cir. (N.C.)) (pro se corporate appellant's appeal ignored after its notice was filed pro se and no attorney had appeared); *Biogenics, Inc. v. Kazen*, 6 Fed. Appx. 689, 691, 2001 WL 227415 (10th Cir. (Utah)) (corporation's appeal dismissed because brief was filed pro se after counsel who filed a proper notice of appeal withdrew).

Respondents believe it necessary to address one final issue raised by BSB that they believe is relevant to its Petition. BSB calls this Court's attention to the November 18, 2002 letter from the Clerk of the Eighth Circuit court of appeals. BSB argues it is inherently contradictory for the clerk to have held the appeal in abeyance to allow BSB to obtain counsel and the court to then dismiss the appeal. However, the letter merely gave BSB time to obtain and consult with counsel to determine whether BSB could validate the prior filings.

Specifically stated that at the end of the 30 days the clerk would refer the matter to the court so that the court could determine whether the appeal should be dismissed. No reasonable person could read this letter to mean that the appellate court would not dismiss the appeal if BSB retained licensed counsel. Nor could a reasonable person find this letter and the court's Judgment contradictory. BSB neither argues nor cites authority for the proposition that the Eighth Circuit was required to notify it prior to dismissing the appeal. This letter was nothing more than a courtesy.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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